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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 214

STATE OF MICHIGAN ET AL. AND THE CITY OF DETROIT ET AL., *Petitioners,*

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF AMICUS CURIAE FOR THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

Filed by the Following Members of the Committee on Taxation and Revenues:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 214

STATE OF MICHIGAN, JOHN J. O'HARA, Auditor General for the State of Michigan, COUNTY OF WAYNE, a corporate body politic, JACOB P. SUMERACKI, Treasurer for the County of Wayne, CITY OF DETROIT, a municipal corporation, and ALBERT E. COBO, Treasurer of the City of Detroit,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF OF AMICUS CURIAE FOR THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

STATEMENT

The National Institute of Municipal Law Officers is an organization of 334 municipalities (located in 45 States) acting through each member city's chief legal officer. The title of this office varies throughout the nation from Corporation Counsel to City Attorney, City Solicitor, Municipal Counsellor, Director of Law, etc. The purposes of the National Institute are to provide a municipally owned and operated clearing house for municipal legal information so as to make the experience of all member cities available to each individual member, and to provide a vehicle for joint action on legal matters affecting all municipalities.

This brief is submitted because the National Institute of Municipal Law Officers is apprehensive of the adverse effect upon city revenues of the decision in the Circuit Court

of Appeals in this case. The decision makes an inchoate lien for the Federal Estate Tax superior and paramount to the specific ad valorem tax liens of states and municipalities. The decision, in our opinion, brings to an end the supremacy of states and cities as taxing sovereignties in their own respective spheres. It nullifies in a large measure both the statutory and case law of several states and if sustained will be a damaging precedent to cities throughout the country.

Since the founding of this Nation, the State and municipal governments have relied almost exclusively upon the real estate tax to obtain necessary funds for their operation. In recent years, State governments have shifted to sales, income, use, and other taxes for a major part of state tax revenues, but city governments still depend almost entirely upon real estate taxes for the revenues to pay their necessary expenses, and the interest on their bonded indebtedness. Almost every bond issued by cities is a lien upon this real estate tax. In this situation, any action which imperils the real estate tax in turn imperils the fiscal integrity of cities.

In recent years real estate has lost its place as a lucrative source of tax revenues because of the decline in real estate values. With the coming of war and the inevitable shifting of population to war industry centers, the taxable wealth of the Nation has been all the more concentrated in wages and other intangibles, rather than real and personal property. Many cities face critical situations due to the taking over of large areas of land by the Federal government and resultant removal of these areas from the tax rolls. Wartime restrictions have lowered the value of business property so as to make necessary a general reassessment in the business districts of many cities. Federal wartime taxes are cutting deeper and deeper into the income of municipal taxpayers, thus making it harder and harder for these taxpayers to meet municipal tax payments. This court can, therefore, understand that if the Federal government can make taxes

it imposes a lien prior to the lien of basic municipal real estate taxes, municipal governments may be unable to function at all because with Federal taxes coming first there will be very little left for the cities. The decision of the Circuit Court of Appeals in this case therefore represents a direct attack upon the fiscal integrity of cities as it lets the Federal government get in ahead of cities, and in effect, destroys the value of the tax upon which municipal government must base its very existence. Such an attack would be disastrous to municipal bondholders as it would sweep away the very thing—the very safety—they thought they were getting, and the very safety which cities thought they were giving these bondholders. No one will purchase a municipal bond if the principle is established that the Federal government can step in and place Federal taxes ahead of city real estate tax liens as the collectability of city taxes would then depend upon the amount of Federal taxes levied, and with the amount of Federal taxes varying from year to year no certainty could surround municipal bonds. Aside from the bondholders, however, the decision strikes directly at cities in such a way as to make wartime operation of cities a real problem if it is sustained and cities are subjected to the fluctuating tax priority ideas of the Federal government. In these circumstances, the undersigned believe it their duty to urge upon this court the most careful consideration of the vital issue before it in this case—the matter is of vital concern to all members of the National Institute of Municipal Law Officers.

Our brief is confined to a summary of the principles which in our opinion the Lower Court has failed to weigh and apply.

SUMMARY OF ARGUMENT

Point I.

Since the amendment of Section 3186 of the Revised statutes, *United States* v. *Snyder,* 149 U. S. 210 and *United States* v. *City of Greenville,* 118 Fed. (2d) 963, no longer apply and the lower Court erred in following these cases.

Point II.

The decision of the Lower Court denies the principle of the traditional and reserved immunity of a sovereign state in the control of its own fiscal affairs.

ARGUMENT

Point I.

Since the amendment of Section 3186 of the Revised Statutes, United States v. Snyder, 149 U. S. 210 and United States v. City of Greenville, 118 Fed. (2d) 963, no longer apply and the Lower Court erred in following these cases.

Municipalities are the creatures and agencies of the State; state tax laws, both statutory and case, apply to the cities. The ad valorem tax is the life of the states and cities, and states are constitutionally supreme in that field. The people of the states have by statute made their ad valorem tax liens by express language prior, superior and paramount to all other liens, and the power to do so has not been surrendered to the Federal government. Ad valorem taxes are levied in proportion to specific state and city budgetary needs; special taxes, such as the estate tax, are levied at a rate free of any specific need and therefore represent a class of lien inferior to specific state liens. The state lien automatically by express language is made prior and paramount and usually valid until paid; on the other hand the estate tax lien is not expressly made a prior lien but requires a ministerial act of recording in accordance

with state recording laws and that being done, the lien is good for a limited period of years. We submit these two liens are not of the same dignity. But even if the estate tax lien, perfected to the ultimate, is of the same class as the specific ad valorem lien of the states, in which supposition the rule of priority in time would apply, yet in the instant case the Federal lien was not perfected for failure to comply with the provisions of Section 3186 R. S., 26 U. S. Code § 1562, the salient provision of which provides for the filing of a Federal lien in accordance with the state law in order to establish the validity of that lien.

We submit that the Lower Court did not give sufficient consideration to the case. It relied upon *United States* v. *Snyder*, 149 U. S. 210 and *United States* v. *City of Greenville*, 118 Fed. (2d) 963 (C. C. A. 4th). On the basis of these two citations, the Lower Court held that the provisions of the Michigan statute governing liens for property taxes were not applicable. In this the Court erred. The *Snyder* case is no longer the law since the amendatory enactments to Section 3186 of the Revised Statutes, and the Fourth Circuit Court in the *Greenville case* perpetuated the error by in turn relying upon the *Snyder* case. The Lower Court in the instant case relied upon both preceding cases and thus further perpetuated the error. The Federal government's case is predicated on this error. If it is still good law that a lien is what the statute makes it, we submit that the Federal government at least must bring itself within the terms of Section 3186 R. S. to give its lien validity; but that even if this had been done, there remains the important rule of statutory construction that the Federal law does not expressly make the estate lien superior, prior and paramount to a specific state ad valorem tax lien. The Federal statute is silent in this important respect. We submit the specific ad valorem tax lien of the state is superior to that of the Federal government and the Lower Court should so have found.

Point II.

The decision of the Lower Court denies the principle of the traditional and reserved constitutional immunity of a sovereign state in the control of its own fiscal affairs.

It appears to us that the decision of the Lower Court cuts more deeply than the technical reasons set forth in the preceding argument. The decision is a direct attack upon a principle fundamentally vital to state and city survival; it is a direct attack upon the sovereignty of the state. The state originally possessed and still possesses, the power to live by taxation. In *McCulloch* v. *State of Maryland,* 4 Wheat. (U. S.) 316 Mr. Justice Marshall said at page 436:

> "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with the other real property within the state. * * * "

Without the doctrine of immunity the states cannot survive. The power was never relinquished and the principle of state immunity has been scrupulously upheld, protected and fostered by the decisions of this Honorable Court throughout the years. The states have traditionally and of necessity been first in satisfaction from their own ad valorem tax liens. The Federal government is required not to burden the state governments—that obligation is mutual.

In *Ashton* v. *Cameron County Water Improvement District No. 1,* 298 U. S. 513 this Court held (see p. 531) that the Congress may not "impair state powers—pass laws inconsistent with the idea of sovereignty" of the state. The *Ashton* case concerned a question of municipal bankruptcy under Chapter IX of the Bankruptcy Act (48 Stat. 798, 11 U. S. C. §§ 301-303). When the matter again came before this Honorable Court under Chapter X (50 Stat. 653, 11 U. S. C. §§ 401-404) the decision in *United States* v. *Bekins,* 304 U. S. 27 might well indicate a trend away from the principle of state immunity were it not for the fact that this Honorable Court was careful to say at page 51:

> "The statute is carefully drawn so as not to impinge upon the sovereignty of the State. The State retains control of its fiscal affairs."

We submit this fixed principle, solemnly adhered to since the decision in *McCulloch* v. *Maryland, supra,* is now directly attacked by the decision of the Lower Court. There was no deviation from this fixed line in *United States* v. *Bekins, supra,* in which a majority of this Honorable Court affirmed the constitutionality of the Municipal Bankruptcy Amendment.

The Congress observed the rule and did not attempt to make the estate tax lien here in question prior to the specific ad valorem lien of the States. It remained for the Circuit Court of Appeals in the instant case to differ with both bodies. The decision denies that states may of right work out their own salvation and is diametrically opposed, in our opinion, to the constitutional immunity of a state in its fiscal affairs, so strictly adhered to by both the Congress and this Honorable Court.

CONCLUSIONS

The Federal government has not perfected its inchoate lien. Even if the Federal government had done so as opposed to the state statute, which creates a specific lien first and prior over all other liens and encumbrances, the Federal statutes themselves are silent on the priority of the estate lien over any specific ad valorem state tax lien. Congress has carefully avoided the use of any language to make or attempt to create such priority and the Circuit Court of Appeals was in error in reading such priority into the Federal tax statute here considered.

The State is supreme in its own fiscal affairs and the decision of the Circuit Court of Appeals herein is a denial of that vital principle and should be reversed by this Honorable Court in order that the sovereignty of the states may not be infringed upon or denied.

Respectfully submitted on behalf of the member cities of the National Institute of Municipal Law Officers by the following members of the Committee on Taxation and Revenues:

FRANCIS P. BURNS,
City Attorney of New Orleans, Louisiana, Chairman.

JOHN J. GRIFFIN,
City Attorney of Elizabeth, New Jersey, Vice-Chairman.

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City Attorney of Racine, Wisconsin.

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SUPREME COURT OF THE UNITED STATES.

No. 214.—October Term, 1942.

State of Michigan, John J. O'Hara, Auditor General for the State of Michigan, County of Wayne, a corporate body politic, Jacob P. Summeracki, Treasurer for the County of Wayne, City of Detroit, a municipal corporation, and Albert E. Cobo, Treasurer of the City of Detroit, Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 4, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

This is a companion case to No. 156, *The Detroit Bank* v. *United States*, decided this day. It involves the lien for estate taxes asserted by the Government and considered in our opinion in that case.

Petitioners, the City of Detroit, the County of Wayne, and the State of Michigan, assert liens for city, county and state taxes on the real estate in question, accruing subsequent to the federal estate tax lien. As defendants in the suit brought by the Government to foreclose the lien, they attack it on all the grounds considered and rejected in our opinion in the *Detroit Bank* case. They also contend that the state liens are given superiority over the federal lien by virtue of state statutes. Section 3429 of the Compiled Laws of Michigan, 1929, as amended by Act No. 38 of the Extra Session of 1934, declares that taxes "shall become a lien upon such real property" on specified dates following their assessment and, as construed by petitioners, states that they shall be a "first lien, prior, superior, and paramount". Section 3746 authorizes the filing of notice of liens as provided in R. S. § 3186, in the office of registers of deeds in the counties of Michigan. Petitioners contend that these and other statutory provisions as construed by Michigan courts give superiority to state tax liens

over other unrecorded liens, including the present estate tax lien of the federal Government.

We do not stop to inquire whether this construction of the state statutes is the correct one for we think the argument ignores the effect of a lien for federal taxes under the supremacy clause of the Constitution. The establishment of a tax lien by Congress is an exercise of its constitutional power "to lay and collect taxes". Article I, § 8 of the Constitution. *United States* v. *Snyder*, 149 U. S. 210. And laws of Congress enacted pursuant to the Constitution are by Article VI of the Constitution declared to be "the Supreme Law of the Land; and the Judges in every State shall be bound thereby any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

"It is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes *cum onere*." *Burton* v. *Smith*, 13 Pet. 464, 483; *Rankin* v. *Scott*, 12 Wheat. 177, 179; *Howard* v. *Railway Co.*, 101 U. S. 837, 845. Hence it is not debatable that a tax lien imposed by a law of Congress, as we have held the present lien is imposed, cannot, without the consent of Congress, be displaced by later liens imposed by authority of any state law or judicial decision. *United States* v. *Snyder, supra; United States* v. *City of Greenville*, 118 F. 2d 963. Similarly we held that the priority of payment commanded by R. S. § 3466 could not be set aside by state legislation. *United States* v. *Texas*, 314 U. S. 480, 486; *County of Spokane* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290; cf. *Missouri* v. *Ross*, 299 U. S. 72.

As the federal lien with which we are here concerned attached to private property prior to the acquisition of any interest in that property by the state, we need not consider the extent to which Congress may give, or intended by § 315(a) to give, priority to a federal lien over a previously perfected state lien. Compare *New York* v. *Maclay, supra*, 292; *County of Spokane* v. *United States, supra*, 95; *United States* v. *Texas, supra*, 484-6.

Affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

END